Supreme Court, U.S.
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No. 98-825

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

AMIEL CUETO
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

BRIEF OF AMICUS CURIAE

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QUESTIONS PRESENTED FOR REVIEW

1. Can a lawyer be convicted under the omnibus clause of the obstruction of justice statute, 18 U.S.C. §1503, for filing false pleadings and court papers on behalf of a client?

2. Can a lawyer be convicted under the omnibus clause of the obstruction of justice statute, 18 U.S.C. §1503, for petitioning a state prosecutor in two written letters and the publication of an editorial opinion, to bring a corrupt public official to justice?

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BRIEF OF AMICUS CURIAE ILLINOIS TRIAL LAWYERS ASSOCIATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

THE ILLINOIS TRIAL LAWYERS ASSOCIATION (ITLA) files this amicus brief pursuant to this Court's Rule 37.2 (a) in support of Amiel Cueto's petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit. Both petitioner and respondent have granted amicus ITLA consent to file this brief and letters of consent have been filed with the Clerk of this Court.[1]

INTEREST OF AMICUS

The Illinois Trial Lawyers Association is a statewide organization whose members specialize in representing injured consumers and workers. Founded in 1952, the organization currently has 2,300 members. The objects of ITLA shall be to: uphold the Constitution of the United States of America and the State of Illinois; secure and protect the rights of those injured in their persons or civil rights; defend trial by jury and the adversary system of justice; strive to achieve and maintain high standards of professional ethics, competency and demeanor in the bench and bar; promote fair, prompt and efficient administration of justice; and educate and train in the art of advocacy.

STATEMENT OF THE CASE

In a 35 page indictment Attorney Amiel Cueto was charged with conspiracy to defraud the United States (18 U.S.C. § 371) and violating the omnibus clause of the obstruction of justice

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1 No counsel for any party to this case authored this brief in whole or in part, and no person or entity, other than ITLA and its members, made any monetary contribution to its preparation or submission.

statute (18 U.S.C. § 1503). Although acquitted of some charges, he is serving an 87 month prison sentence for what was essentially aggressive lawyering.

The crime, according to Count 2 of the indictment, was filing "false pleadings".

Cueto obtained a state court injunction on behalf of his client Tom Venezia against a liquor control official. The case was removed to the Federal District Court where the order was vacated.

Cueto's "crimes" occurred during the appeals process and were three-fold.

First, he characterized his client as an "honest citizen" (at a time when the man had neither been charged nor convicted of any offense). Second, he alleged in a petition for writ of certiorari to this court that the local state's attorney was aware of the procedure used to summon the agent to court. Third, he allegedly attacked the integrity of the Seventh Circuit Court of Appeals in affirming the lower court.

In Count 6, Cueto's "crimes" were in authoring two letters to the same state's attorney advocating the investigation of the same liquor control agent (Bonds Robinson) for perjury; and for authoring a newspaper editorial where he opined that Robinson did commit perjury. At Cueto's trial no evidence of the agent's alleged perjury was permitted (Robinson never testified).

Hence, a lawyer stands convicted for criticizing an allegedly corrupt government informant, all on behalf of his client, and with no regard for whether the "speech" was true or false.

Venezia was eventually charged and convicted of racketeering. Cueto did not represent Venezia in this case. In Count 7 his "crime" apparently again involved false pleadings in authoring a "model" motion to disqualify the Venezia trial judge under 28

U.S.C. § 144 and 455. The lawyer who filed this "motion" never testified in Cueto's trial and so the "falsity" of this pleading remains unknown.

Counts 2, 6 and 7 charge violations of the omnibus clause of 18 U.S.C. § 1503. Together they form the basis for Count 1 – conspiracy to defraud the United States (18 U.S.C. § 371).

Zealous advocacy? Yes! Crimes? No!

SUMMARY OF ARGUMENT

For the first time in the history of American jurisprudence a lawyer has been sent to prison for doing his job. According to the Seventh Circuit Court of Appeals, "litigation related conduct" such as drafting and filing pleadings and petitioning a state prosecutor to investigate and charge a government informant constitutes obstruction of justice (18 U.S.C. § 1503) and conspiracy to defraud the United States (18 U.S.C. § 371).

How can the members of the Illinois Trial Lawyers Association "secure and protect the rights of those injured in their persons or civil rights" if the "art of advocacy" becomes a crime?

The Seventh Circuit would assure us that lawful advocacy is not a crime unless done with a corrupt motive. But *United States v. Cueto* holds financial self interest may supply the corrupt motive; and, by invoking traditional proximate cause analyses, it further holds that this motive need only be *a* motive in the litigation related conduct.

Most lawyers who represent "the rights of those injured in their persons" do so on a contingent fee basis. The object of their representation is to maximize their client's recovery. The more they get their client, the more they get themselves. The statute allowing tort claims against the United States approves a contingent fee contract. Undeniably, the lawyer's financial self interest is *a* motive in all of these cases.

If a lawyer files a civil complaint for damages against the United States in a federal tort claims case, and the allegations turn out to be wrong (false?), can the lawyer be prosecuted for obstruction of justice or conspiracy to defraud the United States?

It is hard to say because according to *United States v. Cueto*, "whatever the contours of the line between traditional lawyering and criminal conduct, they must inevitably be drawn case by case." (Petitioner's Appendix at p. 23).

Respectfully, a "case by case" approach to the question of when an aggressive lawyer becomes a criminal is simply not acceptable, especially given all of the existing tools available to punish and deter abusive advocacy.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

POINT I

THE SEVENTH CIRCUIT'S OPINION EXPOSES LAWYERS TO AN UNREASONABLE RISK OF CRIMINAL PROSECUTION FOR AGGRESSIVE ADVOCACY AND THE "CORRUPT MOTIVE" ELEMENT AS DEFINED IN THE OPINION OFFERS NO PROTECTION

Amiel Cueto was neither charged nor convicted of racketeering or gambling. If Cueto had been so charged and convicted, then ITLA "wouldn't have a dog in this fight." The Seventh Circuit justifies Cueto's conviction by suggesting he was a participant in Venezia's underlying criminality. In fact, the jury was never asked that question and they certainly never gave that answer.

The inescapable conclusion is that Cueto was charged and convicted under two of the broadest statutes in the criminal code for doing what lawyers do – drafting, filing or suggesting the filing of pleadings, and attacking the credibility of an opponent's witness.

This is dangerous precedent for lawyers and their clients. Day in and day out lawyers attack each other's pleadings. Plaintiff's lawyers are charged with filing groundless complaints; defense lawyers with filing unsupported denials. Abusive discovery practices are all too common. Many times the lawyer's financial self interest is certainly *a* motive, and according to *United States v. Cueto* a "corrupt motive" sufficient to violate 18 U.S.C. § 1503.

At the heart of our legal system is the premise that zealous advocacy, on both sides, even when motivated in part by financial self interest will achieve justice, not obstruct it. In this case there is simply no protection for aggressive advocacy if some element of financial self interest can lead a jury or fact finder to believe that sharp lawyering is really an "endeavor" to obstruct the "due administration of justice" and thus violate the omnibus clause of § 1503.

A lawyer will now think long and hard before filing a medical malpractice case against a hospital whose president happens to be married to a United States Attorney.

What if that same hospital misrepresents the circumstances of the patient's death to the local coroner to avoid an inquest?

If the patient's family lawyer advocates an investigation by the state's attorney as part of his strategy in prosecuting the medical malpractice claim (to maximize the value of the case and consequently maximize his fee), Count 6 in *United States v. Cueto* may subject the lawyer to criminal prosecution. The real loser is the client.

Criminal prosecution is not the only threat. Lawyers will find themselves as defendants in civil R.I.C.O. actions with punitive damage exposure.

Obstruction of justice (18 U.S.C. § 1503) is a predicate act under 18 U.S.C. § 1962 et. seq. If a lawyer's adversary believes

he has filed false pleadings (for example, a motion for sanctions seeking to strike an opponent's answer), and success on the motion results in a larger verdict (and fee), then the "corrupt motive" is present for the predicate act (obstruction of justice) and the R.I.C.O. action.

More fundamentally, *United States v. Cueto* strips lawyers of their First Amendment right to criticize government officials and petition proper authorities for redress. The Seventh Circuit's statement that Cueto's reports and his editorial opinions about Robinson do not enjoy "even a colorable claim to First Amendment protection" is simply wrong. See, for example, *Branzburg v. Hayes*, "[F]reedom of the press is a fundamental personal right which is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets . . . the press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion." 408 U.S. 665, 704 (1972)

This case has created the anomalous result that statements made in pleadings and briefs are absolutely immune from civil defamation suits for fear of chilling advocacy; (*Ash v. Zwietusch*, 159 Ill. 455, 42 N.E. 2d 854 (1896); *Bleaker v. Drury*, 149 F.2d 770 (2nd Cir. 1945)), but are punishable under the criminal code.

POINT II

ADEQUATE PROTECTIONS ALREADY EXIST AGAINST ABUSIVE LITIGATION RELATED CONDUCT WITHOUT RESORTING TO 18 U.S.C. § 371 AND 1503

The Illinois Trial Lawyers Association echoes and supports the lower court's pronouncement that "lawyer's misconduct in criminal acts are not absolutely immune from prosecution."

Lawyer misconduct should be subject to the greatest scrutiny, and it is.

Lawyers are subject to professional discipline, including disbarment. They are subject to civil and criminal contempt. Sanctions lie under Rule 11 of the Federal Rules of Civil Procedure, along with related provisions of state law.

Furthermore, lawyers are also subject to the same criminal laws as any other citizen. Cueto was subject to the same racketeering and gambling statutes as was Venezia. The problem is that Cueto was never charged or convicted of violating these statutes, nor was he charged or convicted of suborning perjury, knowingly destroying critical evidence or threatening a witness, conduct all specifically prohibited by the criminal code.

Instead, the Seventh Circuit has armed the United States Attorney with a dangerous *new* weapon to chill and punish aggressive lawyering, and they admit they did so with virtually no precedent. "There is little case authority directly on point to consider whether an attorney acting in his professional capacity could be criminally liable under the omnibus clause of § 1503 for traditional litigation related conduct that results in an obstruction of justice." (Petitioner's Appendix at p. 16)

The court's reliance on *U.S. v. Cintolo*, 818 F.2d 980 (1st Cir. 1987) is clearly misplaced. In the first place, the facts are distinguishable. More importantly, the defendant's conduct in that case amounted to witness and evidence tampering – conduct for which specific criminal code provisions exist.

Here, to imprison Cueto, the government was forced to resort to the non-specific clause of § 1503 to criminalize zealous advocacy.

If this remains the law of the land, then organizations such as ITLA will be forced to dramatically rethink how its members can "secure and protect the rights of those injured in their persons or civil rights."

CONCLUSION

Practicing law is difficult. *United States v. Cueto* now makes it dangerous. The Illinois Trial Lawyers Association asks this Court to grant the writ of certiorari.

RESPECTFULLY SUBMITTED,

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